

School Food Authority Contract Administration
Food Service Management Companies

Purpose:

This instruction sets forth the policy to provide guidance for school food authorities who contract with a food service management company (FSMC).

Scope:

Sponsors participating in the School Breakfast Program (SBP) and/or National School Lunch Program (NSLP).

Background:

The Office of Inspector General (OIG) conducted an audit of Food Service Management Companies (FSMC's) participation in the National School Lunch Program (NSLP). Because of the significant audit findings, USDA is concerned with the audit's conclusion that existing regulations, policy, and guidance are not followed by State Agencies, school food authorities (SFAs) and FSMCs in operating the NSLP.

The OIG audits of SFA and FSMC contracts identified repeated instances in which FSMCs ignored, amended, deleted or changed solicitation and contract terms, including changes to prototype bids and contracts that had been previously approved by the State Agency. These actions determined where FSMCs:

1. Failed to pass through the value of USDA donated foods contrary to specific solicitation and contract requirements;
2. Pre-credited the value of USDA donated foods when the solicitation documents did not address pre-crediting.

Description:

Program and USDA regulations require that all potential contractors have an opportunity to compete on a fair and equal basis. The solicitation documents must clearly set forth all requirements that offers must fulfill and all other factors to be used in evaluating bids or proposals. These solicitation documents must also identify the basis upon which the contract award will be made. When a contractor is permitted to ignore or change solicitation requirements, competition has been impaired and the procurement process has been compromised. The only appropriate remedy for this deficiency is to conduct a new and proper procurement.

School Food Authority Responsibilities:

1. Maintain a system of contract administration that ensures its contractors perform in accordance with the terms, conditions, and specifications of their contracts.
2. Monitor and enforce the contract terms.
3. Ensure that all contracts, except small purchase, that are funded in whole or in part with nonprofit food service account funds, must contain provisions that allow for administrative, contractual, or legal remedies for instances when contractors violate or breach contract terms and provide for sanctions or penalties as may be appropriate.
4. Promptly address a contractor's failure to comply with a specific contract requirement.

Minor and Material Changes:

A situation may arise when a minor change is needed to the solicitation documents or the terms of the contract. Unless prohibited by applicable State or local requirements, the procurement process can continue when a minor change to the solicitation document is made, as long as the change is provided to all potential contractors in a timely manner. The same holds true for amending an executed contract. When a minor change is needed, a contract amendment can be prepared by the SFA and signed by both parties. However, using these procedures to revise solicitation documents or amend a contract when a material (major) change is necessary is not permissible.

The distinction between a minor change and a material change cannot be quantified for every procurement action undertaken in the CN programs.

However, at a minimum, a change is material when other competitors would respond differently to the solicitation document had the other competitors known of the change. For example, if the solicitation document required daily deliveries between 7 am and 9 am, but the selected contractor requests a change in the contract terms to anytime daily deliveries, the change is material. On the other hand, if the contractor requests a change in the contract specifying a daily delivery timeframe of 7:15 am – 9:00 am, the change is not material.

When changes to solicitation or contract documents are being considered, the SFA must remember that if the potential contractor drafts the amended solicitation documents, the potential contractor becomes ineligible for contract award pursuant to USA regulations.

Changes to Prototype Procurement and Contract Documents:

In some cases, State Agencies have developed prototype solicitation and contract documents that ensure program requirements are met. In addition, the USDA regulations provide that a SFA must make information about its procurement available upon request by the State

Agency when a proposed contract modification changes the scope of a contract (§3016.36(g)(2)(v)). As a result, the State Agency has the authority pursuant to program regulations to require prior approval of changes to its approved prototype solicitation and contract documents.

Further, when a State Agency determines that the proposed or actual change to these documents is not acceptable, the State Agency is obligated to require the SFA take corrective action to remedy the deficiency. State Agencies have a variety of corrective action options available depending on the severity of the deficiency and the SFA's willingness to take timely corrective action. The options range from requiring the SFA correct the procurement and contract documents, disallowing the use of nonprofit food service account funds to pay for contract costs, requiring the SFA conduct a new procurement, or in the most serious cases, withholding of program payments until the State Agency receives acceptable corrective action for the School Food Authority.

School Food Authority Responsibilities for Correcting Procurement and Contract Deficiencies:

When the SFA is notified or determines, itself, that its procurement process or contract is deficient, the SFA must undertake corrective action to remedy the deficiency as soon as possible. When a contract does not comply with the solicitation document, the SFA may not extend or renew the contract, but must initiate a new procurement action at the end of the current contract period.

For example: On September 15, 2003, the SFA identifies a material defect in its FSMC contract. The contract was executed on July 1, 2002, with provisions for four one-year renewals. The SFA may not renew the contract after its current term expires on June 30, 2004, and must conduct a new procurement action.

SOURCE: USDA, FOOD AND NUTRITION MEMORANDUM, DATED, MAY 4, 2004.